

Western New England Law Review

Volume 28 28 (2005-2006)
Issue 2

Article 6

12-16-2009

THE FAIR LABOR STANDARDS ACT—WHERE THE FOURTH CIRCUIT WENT WRONG IN SHALIEHSABOU v. HEBREW HOME OF GREATER WASHINGTON: JUDICIAL EXPANSION OF FAIR LABOR STANDARDS ACT EXEMPTIONS TO INCLUDE MINISTERIAL EMPLOYEES

Sarah L. Santos

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Recommended Citation

Sarah L. Santos, *THE FAIR LABOR STANDARDS ACT—WHERE THE FOURTH CIRCUIT WENT WRONG IN SHALIEHSABOU v. HEBREW HOME OF GREATER WASHINGTON: JUDICIAL EXPANSION OF FAIR LABOR STANDARDS ACT EXEMPTIONS TO INCLUDE MINISTERIAL EMPLOYEES*, 28 W. New Eng. L. Rev. 369 (2006), <http://digitalcommons.law.wne.edu/lawreview/vol28/iss2/6>

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THE FAIR LABOR STANDARDS ACT—WHERE THE FOURTH CIRCUIT WENT WRONG IN *SHALIEHSABOU V. HEBREW HOME OF GREATER WASHINGTON*: JUDICIAL EXPANSION OF FAIR LABOR STANDARDS ACT EXEMPTIONS TO INCLUDE MINISTERIAL EMPLOYEES

INTRODUCTION

Imagine being an employee who works at least forty hours each week, whose duties require specialized training, but who is not entitled to a minimum wage or overtime pay. If you live within the jurisdiction of the Fourth Circuit, you could experience this very problem. In a recent decision,¹ the Fourth Circuit held that protections afforded by the Fair Labor Standards Act of 1938 (“FLSA”)² do not apply to particular employees of religious organizations. The implications of this holding and its persuasive effect are far-reaching, as nearly 1.5 million people in the United States are employed by non-profit religious organizations.³ The FLSA was enacted for the specific purpose of protecting employees from gross inequalities in the workplace.⁴ Although exemptions from the Act’s protection have decreased over time,⁵ the number of employees left unprotected from wage and hour inequality is still high.

Prior to 1938, when Congress enacted the FLSA, employers were not required under federal law to provide fair labor protection to employees.⁶ The FLSA was intended to be a far-reaching piece of legislation that would establish standards to eradicate poor working conditions and inequality, which were leading to labor disputes.⁷

1. *Shaliehsabou v. Hebrew Home of Greater Wash., Inc.*, 363 F.3d 299 (4th Cir. 2004), *reh’g en banc denied*, 369 F.3d 797 (4th Cir. 2004).

2. 29 U.S.C. §§ 201-219 (2000).

3. See The Foundation Center, Frequently Asked Questions, <http://fdncenter.org/learn/faqs/html/employed.html> (last visited Feb. 20, 2006).

4. Seth D. Harris, *Conceptions of Fairness and The Fair Labor Standards Act*, 18 HOFSTRA LAB. & EMP. L.J. 19, 98-99 (2000).

5. THE FAIR LABOR STANDARDS ACT 160-61 (Ellen C. Kearns et al. eds., 1999).

6. *Id.* at 2. In 1938, the FLSA established fair labor protections, including minimum wage and overtime regulations, and severe restrictions on child labor. Harris, *supra* note 4, at 15.

7. Harris, *supra* note 4, at 20-22; see also THE FAIR LABOR STANDARDS ACT, *supra* note 5, at 11-12. Congress enacted the FLSA in 1938 to combat both child labor and great inequality in the workforce. *Id.* at 13-15. The Act set standards for minimum wage, maximum hours, and child labor. *Id.* at 15.

In recent years, however, citizens have begun to take the protections provided by the FLSA, and the Act itself, for granted.⁸

The emergence of federal fair labor standards gave rise to a wide array of questions of meaning and application.⁹ Should a religious organization be compelled to pay its employees minimum wage and overtime pay, or would the government be overstepping its constitutional bounds¹⁰ by imposing such a mandate? Should the exemptions that apply to members of the clergy also apply to janitors and kitchen staff employed by religious organizations? The judiciary and the legislature have grappled with these questions for decades.¹¹ Consequently, legal repercussions of the Act are not clear and they now encompass an evolving body of law for the courts to interpret.

This Note focuses on the Fourth Circuit decision in *Shaliehsabou v. Hebrew Home of Greater Washington, Inc.*, which raises the issue of whether the FLSA provides a ministerial exemption in any circumstance and whether such an exemption would be similar in scope to the ministerial exemption recognized under Title VII of the Civil Rights Act of 1964 ("Title VII").¹²

In an effort to frame the issue in *Shaliehsabou*, Part I provides historical justifications for and the legislative history of the FLSA. Additionally, this section describes exemptions under the FLSA and Title VII. There is divisive judicial debate concerning the use

8. "Having lived under the [Fair Labor Standards] Act for all of these years, the nation has begun to take for granted the principles upon which the Act is based." THE FAIR LABOR STANDARDS ACT, *supra* note 5, at 2.

9. *Id.* at 16-17. Nearly each year since its enactment, amendments to the FLSA have been a topic of legislative initiative. *Id.* This Note will particularly address how the FLSA should be applied to workers employed by religious organizations.

10. The First Amendment to the Constitution of the United States of America states that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof." U.S. CONST. amend. I, cl. 1. This Note considers whether Congress's requiring a religious employer to pay a minimum wage and overtime pay to employees would violate the Religion Clauses of the First Amendment.

11. See, e.g., *Tony and Susan Alamo Found. v. Sec'y of Labor*, 471 U.S. 290 (1985); *Mitchell v. Pilgrim Holiness Church Corp.*, 210 F.2d 879 (7th Cir. 1954); 112 CONG. REC. 11360, 11371 (1966).

12. 42 U.S.C. § 2000e-2 (2000). Generally, Title VII prohibits discrimination in employment. *Id.* However, it also provides an exception:

Notwithstanding any other provisions of this [subchapter] . . . it shall not be an unlawful employment practice for an employer to hire and employ employees . . . on the basis of his religion, sex, or national origin in those certain instances where religion, sex, or national origin is a bona fide occupational qualification reasonably necessary to the normal operation of that particular business or enterprise

42 U.S.C. § 2000e-2(e).

of Title VII in construing potential exemptions under the FLSA. The main contention turns on whether application of the FLSA to ministerial employees violates the Religion Clauses of the First Amendment in the same way that application of Title VII does.

Part II of this Note discusses the relevant case law underlying the *Shaliehsabou* court's reasoning, first looking at Title VII cases and then FLSA cases. Additionally, the main points of the *Shaliehsabou* majority and dissenting opinions are explained to clarify the legal contentions concerning a potential ministerial exemption to the FLSA.

Part III provides a legal analysis of the proposed ministerial exemption, particularly focusing on the dissenting opinion provided by Judge Luttig in *Shaliehsabou*. Essentially, this section argues that Congress did not intend to create a ministerial exemption from the FLSA and that such an exemption cannot be reconciled with past Supreme Court decisions or the First Amendment's Religion Clauses.

Admittedly, the Supreme Court historically has been hesitant to place governmental restrictions on religious organizations.¹³ In particular circumstances, however, the Court has required religious organizations to abide by the terms of the FLSA.¹⁴ Moreover, the Court has never examined a case factually similar to *Shaliehsabou*, where the Fourth Circuit recognized a ministerial exemption under the FLSA.¹⁵ This Note will therefore put aside the question of whether the Supreme Court is likely to interfere with religious organizations' autonomy with respect to wages. The primary objective of this Note is to highlight the shortcomings in a line of reasoning that began in the Department of Labor and resulted in the *Shaliehsabou* decision—this goal can be accomplished without speculation as to whether the Supreme Court would agree with Judge Luttig's proposed outcome in *Shaliehsabou*.

13. Oliver S. Thomas, *The Power To Destroy: The Eroding Constitutional Arguments For Church Tax Exemption And The Practical Effect On Churches*, 22 CUMB. L. REV. 605, 611 (1992); see, e.g., *Church of the Holy Trinity v. United States*, 143 U.S. 457 (1892) (finding that a statute prohibiting importation of foreign labor did not apply to a religious organization).

14. See, e.g., *Tony and Susan Alamo Found.*, 471 U.S. at 290 (holding that a religious foundation was required to comply with the FLSA).

15. Arguably, the Court will undertake a fact-based inquiry when deciding whether to place restrictions on a religious organization.

I. THE FAIR LABOR STANDARDS ACT AND TITLE VII

In *Shaliehsabou*, the Fourth Circuit not only recognized a ministerial exemption from the FLSA, but also held that this exemption was similar in scope to the ministerial exemption from Title VII.¹⁶ In order to consider the legitimacy and the implications of this holding, it is first necessary to consider the historical context leading to the enactment of the FLSA, the Act's legislative history, and the recognized exemptions under both the FLSA and Title VII.

A. *Legislative History of the FLSA*

In 1938, Congress attempted to combat inequity in the workforce by setting minimum standards for wages, hours, and child labor in the FLSA.¹⁷ Prior to the enactment of the FLSA, societal conflict raged between proponents of absolute freedom of contract in the employment setting and those who insisted on remediation of the disproportionate balance of bargaining power between employers and employees.¹⁸ At the height of the Industrial Revolution, the 1920s saw a shift in population from rural farmlands to towns and urban areas, resulting in a dramatic increase in employment throughout the 1920s and 1930s.¹⁹ This increase, along with the mechanization of industry, led to far greater productivity.²⁰ But the increase in number of persons seeking employment and new-found industrial efficiency meant that workers possessed significantly less bargaining power than did their employers.²¹ To combat wage and hour inequities, as well as the evil of child labor, Congress began to enact legislation in particular indus-

16. *Shaliehsabou v. Hebrew Home of Greater Wash., Inc.*, 369 F.3d 299, 305-07 (4th Cir. 2004). "The ministerial exception operates to exempt from the coverage of various employment laws the employment relationships between religious institutions and their ministers." *Shaliehsabou v. Hebrew Home of Greater Wash., Inc.*, 247 F. Supp. 2d 728, 730 (D. Md. 2003), *aff'd*, 363 F.3d 299 (4th Cir. 2004). For further discussion of the constitutionally compelled exemption to Title VII, see *infra* Part I.C.

17. Harris, *supra* note 4, at 19-23 (referring to 29 U.S.C. §§ 201-219 (2000)); see also William R. Corbett, *Waiting for the Labor Law of the Twenty-First Century: Everything Old is New Again*, 23 BERKELEY J. EMP. & LAB. L. 259, 270 (2002).

18. Harris, *supra* note 4, at 21. Harris notes that "[f]rom the demise of slavery through the passage of the Fair Labor Standards Act in 1938, participants in the debate over fairness in wages increasingly accepted the premise that individual workers had significantly less bargaining power in the labor market than employers." *Id.* at 20.

19. *Id.* at 97-98. This shift was partially due to a rural depression and the relatively high pay of urban jobs. *Id.*; see also IRVING BERNSTEIN, *THE LEAN YEARS: A HISTORY OF THE AMERICAN WORKER, 1920-1933* 48 (1960).

20. Harris, *supra* note 4, at 98.

21. *Id.* at 98-99.

tries, but “was not yet prepared to reach out to regulate the conditions of employment in general.”²² Even before Congress attempted to address the problem of inequity in the workforce, many states had taken legislative action in this area.²³ But by the mid-1930s it was evident that federal law was necessary to establish nationwide fair labor standards.²⁴

In 1937, President Roosevelt sent a message to Congress pressing it to enact such a statute.²⁵ President Roosevelt stated,

Our nation . . . should be able to devise ways and means of insuring to all our able-bodied working men and women a fair day's pay for a fair day's work. A self-supporting and self-respecting democracy can plead no justification for the existence of child labor, no economic reason for chiseling workers' wages or stretching workers' hours.

Enlightened business is learning that competition ought not to cause bad social consequences which inevitably react upon the profits of business itself. . . . Government must have some control over maximum hours, minimum wages, the evil of child labor, and the exploitation of unorganized labor.²⁶

In response, the 75th Congress held a number of hearings and,

22. THE FAIR LABOR STANDARDS ACT, *supra* note 5, at 5. In 1868, Congress passed a statute mandating an eight-hour maximum work day for government workers. Yet, in effect, this statute did not stop workers from performing overtime work. *Id.* at 3-4. In 1915, Congress specifically addressed problems in the shipping industry by enacting maximum hour restrictions, along with restrictions on overworking sailors and minimum food and drink allowances for sailors. *Id.* at 4-5. In 1935, Congress imposed maximum hour standards on the Motor Carriers to ensure public safety in this industry. *Id.* at 5-6. In 1931, Congress enacted the Davis-Bacon Act, which required federal contractors to pay employees according to the wage that prevailed among employees engaged in a similar line of work in that region. *Id.* at 6-7. The Walsh-Healey Government Contracts Act mandates specific working conditions and wages for workers under contract with the federal government. *Id.* at 7-8. In 1933, Congress passed the National Industrial Recovery Act allowing the president to control maximum hours, minimum wages, and any other employment conditions in an industry that was engaging in “unfair competition” or unfair practices. *Id.* at 8-9.

23. *Id.* at 9. Some state statutes set a monetary minimum wage while others appointed a commission to do so. *Id.* at 10. Ironically, state minimum wage laws typically “applied only to women and children, whose freedom to contract was already limited by their ‘weakness’ and inferiority in society.” *Id.* at 10-11; *see also* West Coast Hotel Co. v. Parrish, 300 U.S. 379, 394-95 (1937) (holding that certain legislation that was designed to protect women was not necessary to protect men).

24. Harris, *supra* note 4, at 20; *see also* THE FAIR LABOR STANDARDS ACT, *supra* note 5, at 11-12.

25. THE FAIR LABOR STANDARDS ACT, *supra* note 5, at 11-12

26. FRANKLIN D. ROOSEVELT, WAGES AND HOURS: MESSAGE FROM THE PRESIDENT OF THE UNITED STATES, H.R. REP. NO. 75-255, at 2 (1937).

after the proposal of various pieces of legislation in both the House and the Senate, the House and Senate Labor Committees issued a joint statement.²⁷ The statement proposed that the “maintenance of substandard labor conditions” by even a few employers within an industry negatively affects interstate commerce.²⁸ In the end, reputable employers were being unfairly disadvantaged because low wages and poor working conditions often resulted in dissatisfied employees and labor disputes.²⁹ States were powerless to address the issue because goods produced under substandard labor conditions were flowing freely to states that attempted to enforce fair labor laws.³⁰ The joint committee concluded,

[T]he existence in industries engaged in commerce, or in the production of goods for commerce, of labor conditions detrimental to the maintenance of the minimum standard of living necessary for health, efficiency and general well-being, required immediate action to correct, and as rapidly as possible to eliminate, conditions in such industries without substantially curtailing employment or earning power.³¹

After much debate and several legislative proposals, the FLSA was adopted on June 25, 1938, establishing minimum wage, overtime, and child labor provisions.³² The FLSA protections do not, however, reach every employed person. Indeed, as this Note will discuss in the following section, Congress has carved out numerous exemptions from the FLSA.

B. *FLSA Coverage and Exemptions*

Congress intended the FLSA to be far-reaching in order to combat a broad societal problem.³³ To benefit from the protections afforded by the FLSA, a bona fide employment relationship must exist between an employer and a worker.³⁴ The FLSA’s legislative

27. THE FAIR LABOR STANDARDS ACT, *supra* note 5, at 12-13.

28. *Id.* at 12.

29. *Id.* at 12-13.

30. *Id.* at 13.

31. H.R. REP. NO. 75-2738, at 28 (1937) (Conf. Rep.).

32. THE FAIR LABOR STANDARDS ACT, *supra* note 5, at 14-15.

33. *Id.* at 295-303.

34. *Id.* at 71-77; *see* 29 U.S.C. §§ 206-207 (2000). The Act defines an employee as “any individual employed by an employer.” 29 U.S.C. § 203(e)(1) (2000). An employer is defined as “any person acting directly or indirectly in the interest of an employer in relation to an employee” 29 U.S.C. § 203(d). The “verb ‘employ’ [is defined] expansively to mean ‘suffer or permit to work.’” *Nationwide Mut. Ins. Co. v. Darden*, 503 U.S. 318, 326 (1992) (quoting 29 U.S.C. § 203(g)). In *Nationwide*, the Supreme

history demonstrates that Congress intended the term “employee” to have an expansive scope.³⁵ Senator Hugo Black stated that the term “employee” in the FLSA was intended to be given “the broadest definition that has ever been included in any one act.”³⁶ Another Congressman characterized the FLSA as “the most momentous and far-reaching measure that . . . [Congress has] considered for many years.”³⁷ The United States Supreme Court also noted that the “[b]readth of coverage was vital to the [Act’s] mission”³⁸ to eradicate substandard working conditions.³⁹

To determine whether a person is an employee for FLSA purposes, courts look at the totality of the circumstances, and particularly at the “economic reality” of the relationship.⁴⁰ The Supreme Court explained that the economic reality test considers whether one took a job “in expectation of compensation.”⁴¹ An individual who works solely for pleasure or other non-financial purpose, without promise or expectation of compensation, is not protected by the

Court also stated that the definition of the word employ “stretches the meaning of ‘employee’ to cover some parties who might not qualify as such under a strict application of traditional agency principles.” *Id.* at 326. The Supreme Court has also indicated that this definition is so far-reaching that it may even cover persons other than those Congress intended to include. THE FAIR LABOR STANDARDS ACT, *supra* note 5, at 76 n.7 (citing *Walling v. Portland Terminal Co.*, 330 U.S. 148, 152 (1947)) (holding that the definition, if taken literally, could be read to include students as employees of the schools that they attended). In addition to the “employee” criteria, the employer must also be an “enterprise engaged in commerce or in the production of goods for commerce.” 29 U.S.C. § 203(r). In *Shaliehsabou*, however, Hebrew Home’s enterprise status is not at issue. *Shaliehsabou v. Hebrew Home of Greater Wash., Inc.*, 363 F.3d 299 (4th Cir. 2004), *reh’g en banc denied*, 369 F.3d 797 (4th Cir. 2004).

35. John Bruntz, *The Employee/Independent Contractor Dichotomy: A Rose is Not Always a Rose*, 8 HOFSTRA LAB. & EMP. L.J. 337, 341-42 (1991); *see also id.* at 342 n.48 (citing *Cobb v. Sun Papers, Inc.*, 673 F.2d 337, 340 (11th Cir. 1982), *cert. denied*, 459 U.S. 874 (1982) (quoting Senator Hugo Black’s statement that the term “employee” in the FLSA was intended to be given “the broadest definition that has ever been included in any one act”)).

36. 81 CONG. REC. 7648, 7657 (1937).

37. 83 CONG. REC. 9246, 9262 (1938) (statement of Representative Fish).

38. Bruntz, *supra* note 35, at 355 (citing 83 CONG. REC. 9262 (1938) and *Powell v. United States Cartridge Co.*, 339 U.S. 497, 516 (1950)).

39. Corbett, *supra* note 17, at 355.

40. THE FAIR LABOR STANDARDS ACT, *supra* note 5, at 73; *see also Bartels v. Birmingham*, 332 U.S. 126, 130 (1947) (holding that “employees are those who as a matter of economic reality are dependent upon the business to which they render service”).

41. *Tony and Susan Alamo Found. v. Sec’y of Labor*, 471 U.S. 290, 301-02 (1985). The “economic reality” test is also used to determine whether an entity can be defined as an enterprise under the Act. Courts must assess whether the entity has entered the “economic arena [and is involved in] trafficking in the marketplace.” *Id.* at 294.

FLSA.⁴² Considering the broad scope intended by Congress, the Supreme Court's economic reality test appears relatively easy to meet.

Despite the all-encompassing definition of the term "employee," and the broad application intended by Congress, the FLSA does enumerate certain exceptions to its minimum wage and overtime requirements.⁴³ In light of the societal conditions that Congress intended to rectify by enacting the FLSA, courts construe the statutory exemptions from the FLSA narrowly.⁴⁴ The Supreme Court explained that Congress specifically developed certain exceptions to the FLSA and that "[t]he details with which the exemptions in this Act have been made preclude their enlargement by implication."⁴⁵ In *A.H. Phillips, Inc. v. Walling* ("*A.H. Phillips*"),⁴⁶ a case involving a FLSA exemption (that was later repealed) for retail establishments,⁴⁷ the Supreme Court held that "[t]o extend an exemption to other than those plainly and unmistakably within its terms and spirit is to abuse the interpretive process and to frustrate the announced will of the people."⁴⁸ However, confusion relating to congressional debate⁴⁹ over a proposed 1966 amendment to the FLSA led the Fourth Circuit to do precisely what the Supreme Court warned against in *A.H. Phillips*.

In 1966, Congress considered a proposed amendment to the

42. *Id.* at 295 (quoting *Walling v. Portland Terminal Co.*, 330 U.S. 148, 152 (1947)).

43. THE FAIR LABOR STANDARDS ACT, *supra* note 5, at 295-303. Very particularized exemptions are provided for certain white-collar workers, agricultural workers, seamen, and babysitters, to name a few. For a list of additional exemptions, see *id.* at 295-303. Congress included these narrow exemptions partially because its regulation of particular activities, which were traditionally controlled by the states, would be beyond the scope of the Commerce Power. *Id.* at 30-31. Throughout the existence of the FLSA, Congress has created and revoked exemptions. The number of exemptions, for both minimum wage and overtime requirements, recognized by Congress has decreased over time. Consequently, the FLSA's protections have increasingly been extended to more employees. *Id.* at 160-61. See *id.* at 295-303 for a list of exemptions, including those which have been repealed.

44. THE FAIR LABOR STANDARDS ACT, *supra* note 5, at 162-63 (citing to *Addison v. Holly Hill Fruit Prods. Inc.*, 322 U.S. 607, 618 (1944)).

45. *Addison*, 322 U.S. at 618.

46. 324 U.S. 490 (1945).

47. 29 U.S.C. § 213(a)(2) (repealed 1989).

48. *A.H. Phillips*, 324 U.S. at 493. The Court reasoned, "Congress did not intend to exempt as a 'retail establishment' the warehouse and central office of an interstate chain store system." *Id.* at 496-97.

49. For further consideration of this congressional debate, see *infra* Parts II.B.2 and III.B.

FLSA regarding the meaning of the term “enterprise.”⁵⁰ During the debate, an exchange took place which focused on whether nuns employed in the cafeteria of a parochial elementary school would be exempt from the Act’s minimum wage requirements.⁵¹ The question was answered affirmatively.⁵² Although the final version⁵³ of the 1966 Amendment only focused on the definition of the term “enterprise,” and not the term “employee,” both the Department of Labor (“DOL”) and the Fourth Circuit⁵⁴ relied upon the aforementioned exchange to justify a ministerial exemption to the term “employee” under the FLSA.⁵⁵ Judge Luttig’s dissent in the *Shaliehsabou* case concerning the majority’s improper reliance on congressional exchanges has considerable merit.⁵⁶ This is especially true in light of the Fourth Circuit’s reliance on Title VII cases when considering FLSA wage and hour issues because Title VII treatment of hiring issues is inapplicable to FLSA treatment of wage and hour issues.

C. Title VII of the Civil Rights Act of 1964

In an effort to desegregate employment, particularly in the South, Congress included Title VII in the Civil Rights Act of 1964.⁵⁷

50. 29 U.S.C. § 203(r) (2000). Issues surrounding the meaning of the term “enterprise” are beyond the scope of this Note. However, congressional debate on this issue, addressed later in this Note, does shed light on whether ministerial workers are “employees” under the FLSA. See *infra* Parts II.B.2 and III.B.

51. 112 CONG. REC. 11360, 11371 (1966).

52. *Id.*

Mr. PUCINSKI. Let us consider a parochial elementary school, in which the nuns do the work in the cafeteria. Would they have to be paid a minimum wage?

Mr. COLLIER. No, they would not be covered.

Mr. BURTON of California. As I understand, it is not the gentleman’s intention to include members of a religious order under the definition of employee, and therefore a nun would not be considered an employee. Therefore, a minimum wage would not be required to be paid a nun. Am I correct in my understanding of the gentleman’s intention?

Mr. COLLIER. That is correct. I did not intend to cover them.

Id.

53. 29 U.S.C. § 203(r).

54. *Shaliehsabou v. Hebrew Home of Greater Wash., Inc.*, 369 F.3d 299, 305-07 (4th Cir. 2004); *Dole v. Shenandoah Baptist Church*, 899 F.2d 1389 (4th Cir. 1990).

55. 112 CONG. REC. 11360, 11371 (1966). For further discussion see *infra* Parts II.B.2 and III.B.

56. *Shaliehsabou v. Hebrew Home of Greater Wash., Inc.*, 369 F.3d 797, 802 (4th Cir. 2004) (Luttig, J., dissenting).

57. LEGACIES OF THE 1964 CIVIL RIGHTS ACT 21, 49 (Bernard Grofman ed., 2000) (citing 42 U.S.C. §§ 2000e-2000e-17).

Title VII prohibits discrimination in the employment setting.⁵⁸ Courts have found it difficult, however, to reconcile the goal of non-discrimination in the workplace with religious organizations' right to, and need for, autonomy in employing ministers and clergy members.⁵⁹ Indeed, courts must confront the seemingly inevitable collision between the compelling objective of safeguarding against discrimination and the government neutrality mandated by the religion clauses of the First Amendment.⁶⁰ Since the enactment of Title VII, courts have been called upon to differentiate between government promotion of religion through preferential treatment provided to religious organizations, which is impermissible, and the permissible effect of allowing religious organizations to advance religion without governmental interference.⁶¹

58. *Id.* Under Title VII, "[e]mployers may hire and fire, promote and refuse to promote for any reason, good or bad, provided only that individuals may not be discriminated against because of race, religion, sex or national origin." RICHARD ALLEN EPSTEIN, *FORBIDDEN GROUNDS: THE CASE AGAINST EMPLOYMENT DISCRIMINATION LAWS* 161 n.2 (1992) (citing Senator Humphrey's remarks at 110 CONG. REC. 6548 (1964)).

59. *See, e.g.,* *Combs v. Cent. Tex. Annual Conference of United Methodist Church*, 173 F.3d 343 (5th Cir. 1999) (denying female clergy member's claim that church-minister exception under Title VII no longer exists); *E.E.O.C. v. Catholic Univ. of Am.*, 83 F.3d 455 (D.C. Cir. 1996) (sex discrimination claim brought by Catholic nun in relation to denial of tenure at Catholic university); *Minker v. Baltimore Annual Conference of United Methodist Church*, 894 F.2d 1354 (D.C. Cir. 1990) (age discrimination suit filed by minister who had his request for reassignment denied); *Rayburn v. Gen. Conference of Seventh-day Adventists*, 772 F.2d 1164, 1171 (4th Cir. 1985) ("Of course churches are not—and should not be—above the law. Like any other person or organization, they may be held liable for their torts and upon their valid contracts. Their employment decisions may be subject to Title VII scrutiny, where the decision does not involve the church's spiritual functions.").

60. The First Amendment states, "Congress shall make no law respecting an establishment of religion, or prohibiting free exercise thereof . . ." U.S. CONST. amend. I. "The Establishment Clause . . . prevents a State from enacting laws that have the 'purpose' or 'effect' of advancing or inhibiting religion." *Zelman v. Simmons-Harris*, 536 U.S. 639, 648-49 (citing *Agostini v. Felton*, 521 U.S. 203, 222-23 (1997)). It is clear that a religious organization's hiring decisions are protected by the Free Exercise Clause and the Establishment Clause of the First Amendment. The government cannot tell a religious organization whom it should or should not hire. For further discussion of whether a similar analysis should apply to overtime pay and a minimum wage requirements under the FLSA, see *infra* Part III.D.

61. Laura L. Coon, *Employment Discrimination By Religious Institutions: Limiting the Sanctuary of the Constitutional Ministerial Exception to Religion-Based Employment Decisions*, 54 VAND. L. REV. 481, 495 (2001) (citing *Corp. of the Presiding Bishop of the Church of Jesus Christ of Latter-Day Saints v. Amos*, 483 U.S. 327, 336-37 (1987)). In *Amos*, the Court clarified, "A law is not unconstitutional simply because it allows churches to advance religion, which is their very purpose. For a law to have forbidden effects . . . government [must have] advanced religion through its own activities and influence." Coon, *supra* note 61, at 495 n.55 (citing *Corp. of the Presiding*

Congress did not intend Title VII to apply to employees who performed religious functions.⁶² Thus, when an employee asserts a Title VII employment discrimination claim against a religious organization, the employer typically invokes the protection of Title VII's statutory religious exemption⁶³ or the constitutional ministerial exception.⁶⁴ Indeed, § 702 of Title VII exempts religious corporations, associations, educational institutions, or societies from the Title's provisions "with respect to the employment of individuals of a particular religion to perform work connected with" the organization's activities.⁶⁵ Prior to a congressional amendment to § 702 in 1972, the exemption applied only to an organization's "religious" activities.⁶⁶ The 1972 amendment deleted the word "religious," thereby removing Title VII protection for workers who performed secular duties for religious organizations as well as those who performed religious duties.⁶⁷

Following the 1972 amendment, numerous employees challenged the constitutionality of the exemption.⁶⁸ Challengers alleged that § 702 "favored religious organizations by allowing religious employers to avoid application of Title VII, while similarly situated non-religious employers remained open to liability," thereby violating the Establishment Clause of the First Amendment.⁶⁹ Thus, courts have been hesitant to construe § 702 as vesting complete immunity from discrimination claims in religious

Bishop of the Church of Jesus Christ of Latter-Day Saints v. Amos, 483 U.S. 327, 337 (1987)).

62. Coon, *supra* note 61, at 487.

63. 42 U.S.C. § 2000e-1 (2000).

64. Coon, *supra* note 61, at 486. The constitutional ministerial exemption is rooted in both the Free Exercise Clause and the Establishment Clause of the First Amendment.

65. 42 U.S.C. § 2000e-1.

66. Civil Rights Act of 1964, PUB. L. NO. 88-352, § 702, 78 Stat. 241, 255; see Joanne C. Brant, "Our Shield Belongs to the Lord": Religious Employers and a Constitutional Right to Discriminate, 21 HASTINGS CONST. L.Q. 275, 284 (1994).

67. Brant, *supra* note 66, at 284. In *McClure v. Salvation Army*, the Fifth Circuit extended the constitutional ministerial exemption to discrimination based on sex, race and national origin, explaining, "The relationship between an organized church and its ministers is its lifeblood. The minister is the chief instrument by which the church seeks to fulfill its purpose. Matters touching this relationship must necessarily be recognized as of prime ecclesiastical concern." Coon, *supra* note 61, at 499-506 (referring to *McClure v. Salvation Army*, 460 F.2d 553 (5th Cir. 1972), *cert. denied*, 409 U.S. 896 (1972)); see also Janet S. Belcove-Shalin, *Ministerial Exception and Title-VII Claims: Case Law Grid Analysis*, 2 NEV. L.J. 86 (2002).

68. Coon, *supra* note 61, at 488.

69. *Id.* The Establishment Clause prohibits state governance that either inhibits or advances religion. *Id.*

organizations.⁷⁰ Although the Supreme Court upheld the constitutionality of Title VII's built-in exception for both secular and non-secular activities of religious institutions,⁷¹ subsequent federal case law has limited the extent to which such organizations can assert immunity from employment discrimination claims.⁷² Moreover, most courts have held that religious organizations may discriminate only if discriminatory employment decisions are "sufficiently rooted in religious belief or practice to implicate the First Amendment's Religion Clauses."⁷³

II. RELEVANT CASE LAW

A. Title VII Cases

*Rayburn v. General Conference of Seventh-day Adventists*⁷⁴ is the first Fourth Circuit case to articulate the standard for applying the Title VII ministerial exception.⁷⁵ Rayburn, who applied for an internship with the Seventh-Day Adventist Church, alleged that the church sexually and racially discriminated against her in violation of Title VII.⁷⁶ Cognizant that Title VII did not protect religious employers from all forms of employment discrimination, the court developed a test that balanced the goals of Title VII with a religious organization's constitutional right to religious autonomy.⁷⁷ The resulting standard considers the employee's position, or the position sought, to determine "if the employee's primary duties consist of teaching, spreading the faith, church governance supervision of a religious order, or supervision or participation in religious ritual and worship."⁷⁸ If the question is answered in the affirmative, then a ministerial exemption applies, and the organization is not held to Title VII mandates with respect to employment discrimination.⁷⁹ To avoid excessive entanglement in church matters by sub-

70. *Id.*

71. Corp. of the Presiding Bishop of the Church of Jesus Christ of Latter-Day Saints v. Amos, 483 U.S. 327 (1987).

72. Coon, *supra* note 61, at 503.

73. *Id.*

74. Rayburn v. Gen. Conference of Seventh-day Adventists, 772 F.2d 1164 (4th Cir. 1985).

75. *Id.* at 1169.

76. *Id.* at 1165.

77. Coon, *supra* note 61, at 504.

78. Rayburn, 772 F.2d at 1169 (quoting Bruce N. Bagni, *Discrimination in the Name of the Lord: A Critical Evaluation of Discrimination by Religious Organizations*, 79 COLUM. L. REV. 1514, 1545 (1979)).

79. *Id.*

jectively evaluating religious factors, the court deferred to the church's hiring decision.⁸⁰ The court held that "introduction of government standards to the selection of spiritual leaders would significantly and perniciously rearrange the relationship between church and state."⁸¹ The position at issue in *Rayburn* was that of a liaison between the church and "those whom it would touch with its message."⁸² Because the selection process involved subjective religious elements, such as spirituality, the church was entitled to non-interference by the government pursuant to the First Amendment's religion clauses.⁸³

A later Fourth Circuit decision that applied the "primary duties" standard established by *Rayburn* was *Equal Employment Opportunity Commission v. Roman Catholic Diocese of Raleigh* ("EEOC").⁸⁴ In *EEOC*, the plaintiff was employed by a Catholic elementary school as a music teacher.⁸⁵ Her primary duties consisted of planning parish liturgies, directing the choir, and teaching music classes to students.⁸⁶ The plaintiff filed suit alleging that her employment was limited, and then terminated, because of her sex.⁸⁷ The court held that the well-recognized ministerial exception prohibited application of Title VII in this particular employment decision because the "constitutionally compelled limitation on civil authority ensures that no branch of secular government trespasses on the most spiritually intimate grounds of a religious community's existence."⁸⁸ The court did note, however, that the ministerial exception does not exempt religious employers from application of federal anti-discrimination statutes altogether.⁸⁹ Rather, the exemption is limited to spiritual functions.⁹⁰ After applying the pri-

80. Coon, *supra* note 61, at 505 (citing *Rayburn*, 772 F.2d at 1167-68). Government entanglement in religious matters constitutes a violation of the First Amendment. *Id.*

81. *Rayburn*, 772 F.2d at 1169.

82. *Id.* at 1168.

83. *Id.*

84. 213 F.3d 795 (4th Cir. 2000).

85. *Id.* at 798.

86. *Id.*

87. *Id.*

88. *Id.* at 800. The court also noted that this doctrine of non-interference with church employment decisions is widely recognized in other circuits.

89. *Id.* at 801 ("Where no spiritual function is involved, the First Amendment does not stay the application of a generally applicable law such as Title VII to the religious employer."). The Title VII exemption is limited to what is necessary to comply with the First Amendment. *Id.*; see also *Rayburn*, 772 F.2d at 1171.

90. *EEOC*, 213 F.3d at 801. For example, the Act would not apply to a religious organization's hiring of custodial or administrative personnel. *Id.*

mary duties test, the court concluded that the plaintiff's primary duties were ministerial and, therefore, the plaintiff was not afforded the protection of Title VII.⁹¹ The court's decision to provide a Title VII ministerial exemption for an employee who spreads religious faith through teaching music and planning liturgies is consistent with the "primary duties" test set forth in *Rayburn*.⁹²

B. *Fair Labor Standards Act Cases*

Here, the discussion turns to several judicial interpretations of the Fair Labor Standards Act's applicability with respect to religious organizations. This section first addresses the principal case,⁹³ in which the issues set forth in this Note arose. Next, the discussion turns to *Dole*,⁹⁴ a Fourth Circuit case on which the *Shaliehsabou* court relied, and also *Alamo*,⁹⁵ a Supreme Court decision which the *Shaliehsabou* court failed to consider.

1. Principal Case: *Shaliehsabou v. Hebrew Home of Greater Washington*

In *Shaliehsabou*, the plaintiff worked for the defendant, a non-profit religious and charitable corporation, as a *Mashgiach*.⁹⁶ As a *Mashgiach*, the plaintiff was responsible for ensuring that food served to residents of the Hebrew Home, which predominantly housed members of the Jewish faith, conformed with Jewish dietary laws.⁹⁷ *Shaliehsabou* worked in this capacity from 1992 through August 2000.⁹⁸ Upon his resignation, *Shaliehsabou* filed suit in Maryland state court alleging that he was entitled to overtime wages pursuant to the FLSA and Maryland state law because, throughout

91. *Id.* at 802. The court concluded that the position was ministerial because it was important to the spiritual and pastoral mission of the church.

92. *Rayburn*, 772 F.2d at 1169.

93. *Shaliehsabou v. Hebrew Home of Greater Wash., Inc.*, 247 F. Supp. 2d 728 (D. Md. 2003), *aff'd*, 363 F.3d 299 (4th Cir. 2004).

94. *Dole v. Shenandoah Baptist Church*, 899 F.2d 1389 (4th Cir. 1990).

95. *Tony and Susan Alamo Found. v. Sec'y of Labor*, 471 U.S. 290 (1985).

96. *Shaliehsabou*, 247 F. Supp. 2d at 729 n.2. A *Mashgiach* is "an inspector appointed by a board of Orthodox rabbis to guard against any violation of Jewish dietary laws." RANDOM HOUSE WEBSTER'S UNABRIDGED DICTIONARY 1181 (2d ed. 1998).

97. *Shaliehsabou v. Hebrew Home of Greater Wash. Inc.*, 363 F.3d 299, 301 (4th Cir. 2004), *reh'g en banc denied*, 369 F.3d 797 (4th Cir. 2004); *see also Shaliehsabou*, 247 F. Supp. 2d at 729 n.2 (noting that a *Mashgiach* is a central figure in Jewish dietary law who ensures that Jewish kosher laws are enforced). "[A] *Mashgiach* is essential, may be required on the premises at all times, must be present to check all products brought into the establishment and must also be present during the preparation of food." *Id.*

98. *Shaliehsabou*, 363 F.3d at 300.

his employment, he was not compensated for all overtime hours worked.⁹⁹ The case was removed to the United States District Court for the District of Maryland, which held that Shaliehsabou fell within a ministerial exemption to the FLSA and, therefore, was not entitled to overtime pay.¹⁰⁰ Shaliehsabou appealed to the United States Court of Appeals for the Fourth Circuit, which affirmed the lower court's decision.¹⁰¹ Subsequently, Shaliehsabou petitioned the Fourth Circuit to hear the case en banc.¹⁰² His petition was denied.¹⁰³

The United States District Court identified the primary issue as whether "the ministerial exemption applies," because if it did, the plaintiff would not be "a covered employee" under the FLSA.¹⁰⁴ The U.S. District Court and the United States Court of Appeals for the Fourth Circuit both held that the plaintiff was employed in a ministerial role by a religiously affiliated employer and thus was not entitled to overtime pay under the FLSA.¹⁰⁵ The primary authority cited by the District Court and the Fourth Circuit majority was the Fourth Circuit's opinion in *Dole v. Shenandoah Baptist Church*.¹⁰⁶

99. *Id.* at 303-04.

100. *Shaliehsabou*, 247 F. Supp. 2d at 733. The district court also noted that even if Shaliehsabou did not fall within the ministerial exemption, he was an exempt executive, administrative or professional employee, under 29 C.F.R. §§ 541.1-541.3 (2003). *Id.* at 733-34. This exemption is limited to salaried employees. It is not clear whether the plaintiff was a salaried employee, because he was often paid at an hourly rate for additional hours when he worked more than eighty hours bi-weekly. *Shaliehsabou*, 363 F.3d at 303-04 n.5. This Note will not address the issue whether Plaintiff falls under 29 C.F.R. §§ 541.1-541.3 (2003).

101. *Shaliehsabou*, 363 F.3d at 311. A three judge panel for the Fourth Circuit heard this case and reached a 2-1 decision. Judge Luttig, the dissenting judge, recommended that the plaintiff petition the entire Fourth Circuit to hear the case. Moreover, Judge Luttig noted that even if a ministerial exemption existed, it would not be as far-reaching as the majority held. *Id.*

102. *Shaliehsabou v. Hebrew Home of Greater Wash., Inc.*, 369 F.3d 797, 797-98 (4th Cir. 2004).

103. *Id.* However, there was a significant split between the judges. Though nine judges voted against rehearing the case, four judges joined Judge Luttig in his dissenting opinion, which was significantly longer than his prior dissenting opinion. *Id.*

104. *Shaliehsabou v. Hebrew Home of Greater Wash., Inc.*, 247 F. Supp. 2d 728, 730 (D. Md. 2003), *aff'd*, 363 F.3d 299 (4th Cir. 2004). Note that the issue identified by the District Court is not whether there is a recognized exemption to the FLSA. The court seems to assume that one exists. The second issue before the court is whether, if the exemption is inapplicable, Plaintiff was an exempt managerial, professional, or administrative employee. *Id.* As previously mentioned, this Note will not address the second issue.

105. *Id.* at 733; *Shaliehsabou*, 363 F.3d at 310-11.

106. *Dole v. Shenandoah Baptist Church*, 899 F.2d 1389 (4th Cir. 1990). For further discussion of *Dole*, see *infra* Part II.B.2. For a discussion of the *Shaliehsabou* court's reliance on *Dole*, see *infra* Part III.B.

Basing its decision on congressional debate and Labor Department guidelines, the Fourth Circuit in *Dole* recognized an exemption from the FLSA similar in scope to the ministerial exemption from Title VII of the Civil Rights Act of 1964.¹⁰⁷

In his brief, yet striking, dissent, Judge Luttig wholly rejected the majority opinion, arguing that no such exemption from the FLSA existed.¹⁰⁸ Judge Luttig, dissenting in two sentences, stated,

I do not believe that there is a 'ministerial exemption' to the Fair Labor Standards Act, . . . and if there were, I do not believe that it would be as far-reaching as the court holds today. Because of the obvious importance of the issue decided, and the evident incorrectness of the court's holding, I urge the appellant to seek rehearing *en banc* from this court, and failing rehearing *en banc* by this court, to seek review in the Supreme Court of the United States.¹⁰⁹

As previously noted, upon Shaliehsabou's petition, a majority of the Fourth Circuit declined to hear the case.¹¹⁰ This prompted an in-depth dissenting opinion from Judge Luttig.¹¹¹ Pointing to the majority's reliance on congressional debate,¹¹² Judge Luttig noted that no other court had ever excluded an employee from FLSA coverage based on a ministerial exemption.¹¹³

2. Additional FLSA Cases

In carving out its ministerial exemption to the FLSA, the *Shaliehsabou* majority relied on the Fourth Circuit's opinion in *Dole v. Shenandoah Baptist Church*.¹¹⁴ The *Dole* decision high-

107. *Shaliehsabou*, 363 F.3d at 305; *Dole*, 899 F.2d at 1397.

108. *Shaliehsabou*, 363 F.3d at 311 (Luttig, J., dissenting).

109. *Id.* Perhaps Judge Luttig chose to write such a brief dissenting opinion because he felt confident in his conclusion and believed that upon revisiting this case other judges would draw the same conclusion.

110. *Shaliehsabou v. Hebrew Home of Greater Wash., Inc.*, 369 F.3d 797, 797 (4th Cir. 2004). Within the Fourth Circuit, four judges voted to rehear the case, and nine voted against revisiting it. *Id.*

111. *Id.* at 798-806 (Luttig, J., dissenting).

112. *Id.* Judge Luttig referred to the lack of a textual basis for a ministerial exemption, the majority's unfounded reliance on congressional debate, and its improper reliance on DOL guidelines. For a more detailed discussion of Judge Luttig's analysis, see *infra* Part III.

113. *Id.* at 798. Though in *Dole* the Fourth Circuit did acknowledge such an exemption in dicta, it did not apply the exemption because the plaintiff did not meet the "primary duties" test. See *infra* Part III.B; *Dole v. Shenandoah Baptist Church*, 899 F.2d 1389, 1396 (4th Cir. 1990).

114. See *Shaliehsabou*, 363 F.3d at 305 (citing *Dole v. Shenandoah Baptist Church*, 899 F.2d 1389, 1391-92 (4th Cir. 1990)).

lights the judicial confusion surrounding the existence of a ministerial exemption to the FLSA. *Dole* involved a salary dispute between the Shenandoah Baptist Church and the teachers and staff who worked at the church's Christian school, Roanoke Valley.¹¹⁵ The government brought suit alleging that Shenandoah violated two elements of the FLSA by paying support staff less than minimum wage and by paying female teachers less than male teachers.¹¹⁶ Shenandoah argued that Congress did not intend schools such as Roanoke Valley to be covered as "enterprises" under the FLSA, and that Congress did not intend the Act to cover teachers and staff at church-run schools as "employees."¹¹⁷

To determine whether Congress intended to include schools such as Roanoke Valley within the term "enterprise,"¹¹⁸ the court looked to congressional debate surrounding the aforementioned 1966 amendment to the FLSA.¹¹⁹ Though Shenandoah argued that the amendment was ambiguous, the court concluded that Congress clearly intended to include a school such as Roanoke Valley within the Act.¹²⁰

After deciding the "enterprise" question, the court turned to whether Congress intended those employed as teachers and staff to be covered as "employees" under the FLSA.¹²¹ Based on the primary duties test applied in *Rayburn*, the court held that the plaintiffs did not fall within a ministerial exemption from the FLSA.¹²² Significantly, the Fourth Circuit relied on *Rayburn*, a Title VII case, in determining whether *Dole* was a protected employee under the

115. *Dole*, 899 F.2d at 1391-92.

116. *Id.* at 1392.

117. *Id.* at 1393-94.

118. As previously noted, the question whether Roanoke Valley fell within the term "enterprise" is beyond the scope of this Note. However, congressional debate on this issue, addressed elsewhere in this Note, does shed some light on whether ministerial workers are "employees" under the FLSA. See Parts I.B and III.B for further discussion of this congressional debate.

119. *Id.* at 1394; *see supra* Part I.B.

120. *Id.* at 1395. The court notes that plain language indicates Congress's intention to include public and private schools, regardless of whether the particular school is operated for profit. *Id.* at 1394 (citing 29 U.S.C. § 203(r) (2000)).

121. *Id.* at 1396.

122. *Id.* at 1396-97. The *Rayburn* court held that a ministerial exemption from Title VII depended on the "spiritual and pastoral" function of the position and not the characterization of the position as clergy. Note that this case was talking about an exemption from Title VII and *not* an exemption from the FLSA. *Rayburn v. General Conference of Seventh-day Adventists*, 772 F.2d 1164, 1168-69 (4th Cir. 1985). The *Dole* court does not clearly justify its decision to extend the Title VII "employee" criteria to the proposed FLSA "employee" exemption.

FLSA.¹²³ The *Dole* court did not justify this extension of the “primary duties” test, nor did it consider the contrast between a Title VII claim for discrimination in hiring decisions and a FLSA claim involving wage and hour concerns.

In addition to congressional debate, the *Dole* court looked to guidelines issued by the Labor Department’s Wage and Hour Administrator to carve out this ministerial exemption to the FLSA.¹²⁴ DOL guidelines state, in pertinent part, that “[p]ersons such as nuns, monks, priests, lay brothers, ministers, deacons and other members of religious orders who serve pursuant to their religious obligations in the schools . . . operated by their church or religious order shall not be considered to be ‘employees.’”¹²⁵ The United States Supreme Court, however, has announced that the weight given to an administrator’s decision depends on the thoroughness of consideration, validity of reasoning, and consistency with earlier pronouncements.¹²⁶ The *Dole* decision does not indicate that the court considered these factors before relying on the DOL guidelines.

In *Tony and Susan Alamo Foundation v. Secretary of Labor* (“*Alamo*”)¹²⁷ the Supreme Court sets forth principles that are applicable to the FLSA question *Shaliehsabou* presents. In *Alamo*, the primary issue was whether the FLSA’s minimum wage, overtime, and record-keeping requirements applied to workers engaged in the commercial activities of a religious organization, and whether such an application would violate the Free Exercise Clause of the First Amendment.¹²⁸ The employees in *Alamo* provided services at a number of the Foundation’s commercial businesses, which raised money for a variety of Christian programs.¹²⁹ The Foundation argued that the FLSA was inapplicable because its workers did not receive monetary wages and, therefore, were not “employees.”¹³⁰

123. *Dole*, 899 F.2d at 1396-97.

124. *Id.* at 1396.

125. *Id.* at 1396 (quoting Wage and Hour Division, U.S. Dept. of Labor, Field Operations Handbook § 10b03(b) (1967)).

126. *Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944). See *infra* Part III.B for a further explanation of this concept.

127. *Tony and Susan Alamo Found. v. Sec’y of Labor*, 471 U.S. 290 (1985).

128. *Id.* at 291-92.

129. *Id.* at 292. The Foundation’s Articles of Incorporation provided that its primary purposes were to “establish, conduct and maintain an Evangelistic Church; to conduct religious services, to minister to the sick and needy, to care for the fatherless and to rescue the fallen, and generally to do those things needful for the promotion of Christian faith, virtue, and charity.” *Id.*

130. *Id.* at 292, 300. Though the workers did not receive cash salaries, they were

Moreover, the workers themselves protested the Act's coverage.¹³¹ The Court held, however, that the "purposes of the Act require that it be applied even to those who would decline its protections."¹³² The Court went on to explain that if it recognized an exception for employees who claimed that they performed services "voluntarily," employers could potentially assert superior bargaining power to coerce workers to waive FLSA protection by claiming that they worked voluntarily.¹³³ Further, the Court classified the workers' duties as more than "'a religious liturgy engaged in bringing good news to a pagan world'" because the Foundation had entered the "economic arena."¹³⁴ Therefore, the Court held that the Foundation's commercial activities fell within the reach of the FLSA.¹³⁵ Thus, after *Alamo*, the FLSA's provisions could be applied to religious organizations that engaged in commercial activities undertaken with a business purpose, even though workers were actively involved in spreading the Christian faith.¹³⁶ In light of the shortcomings of the *Shaliehsabou* majority's decision, it is appropriate to question the *Shaliehsabou* court's failure to consider the Supreme Court's extension of FLSA protection to a religious organization in *Alamo*.

III. ANALYSIS

This Note argues that the Fourth Circuit's decisions in *Dole* and *Shaliehsabou*, which carved out a ministerial exception to the FLSA, were in error. Moreover, the exemption that the *Shaliehsabou* court ultimately recognized went far beyond any scope that a ministerial exemption to the FLSA could reasonably encompass. Drawing from the dissenting opinion in the principal case, the main points of this argument are discussed below.

dependent on the Foundation for food, clothing, shelter and other benefits. The Court found this compensation adequate to classify the workers as employees. *Id.* at 292, 301.

131. *Id.* at 302.

132. *Id.*

133. *Id.*

134. *Id.* at 294-295 (quoting *Donovan v. Tony & Susan Alamo Foundation*, 722 F.2d 397, 400 (8th Cir. 1983)). The Court applied the "economic reality" test to determine whether the Foundation is an enterprise under the Act. *Id.* at 294.

135. *Id.* at 306.

136. The Court held that application of the Act would not impact the Foundation's evangelical activities because the Act's provisions impose very minimal government entanglement with religion. The Court noted that the "Establishment Clause does not exempt religious organizations from . . . secular governmental activity," and that the record-keeping provisions of the FLSA are not significantly intrusive into religious affairs. *Id.* at 305-06.

A. *Ministerial Exemption is Without a Textual or Precedential Basis*

Neither Supreme Court precedent interpreting the FLSA nor the text of the Act itself supports a ministerial exemption from the FLSA. The ministerial exemption proposed in *Shaliehsabou* is undetectable in the text of the FLSA, though the Act enumerates dozens of exemptions.¹³⁷ If Congress intended to include a ministerial exemption, it was capable of doing so explicitly.¹³⁸ With respect to statutory interpretation, Justice Scalia has suggested that judges should avoid efforts to glean legislative intent.¹³⁹ He asserts that when courts attempt to determine what legislators mean, judges often end up pursuing their own objectives and desires.¹⁴⁰ Rather than looking to legislative intent, courts should focus on the plain text of a statute, and the plain text of the FLSA clearly lacks a ministerial exemption.¹⁴¹

The text of the FLSA sets forth a detailed explanation of the intended broad meaning of the term "employee."¹⁴² The FLSA purposely defines "employee" in very general terms as "any individual employed by an employer."¹⁴³ Also, the Supreme Court has clearly stated that the test for employment under the FLSA is "one of economic reality," turning on whether the person undertook the job "in expectation of compensation."¹⁴⁴ Clearly, *Shaliehsabou* expected compensation for his duties, evidenced by the fact that he

137. See THE FAIR LABOR STANDARDS ACT, *supra* note 5, at 295-303.

138. When Congress creates exceptions within a statute, it is presumed that Congress considered the issue of exceptions and included the ones that it intended to include and left out the ones that it intended to leave out. See, e.g., *TRW, Inc. v. Andrews*, 534 U.S. 19, 28 (2001); *United States v. Johnson*, 529 U.S. 53, 58 (2000); *Andrus v. Glover Constr. Co.*, 446 U.S. 608, 616-17 (1980).

139. Antonin Scalia, *Common-Law Courts in a Civil-Law System: The Role of the United States Federal Courts in Interpreting the Constitution and Laws*, in A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW 3, 16-18 (Amy Gutmann ed., 1997).

140. *Id.* at 17-18.

141. *Id.* at 17.

142. *Shaliehsabou v. Hebrew Home of Greater Wash., Inc.*, 369 F.3d 797, 799 (2004) (Luttig, J., dissenting).

143. *Id.* (quoting 29 U.S.C. § 203(e) (2000)); see also *Tony and Susan Alamo Found. v. Sec'y of Labor*, 471 U.S. 290, 295 (1985) (explaining that the FLSA defines "employee" in "exceedingly broad terms").

144. *Alamo*, 471 U.S. at 301-02 (citations omitted). The Supreme Court has further expanded the "economic reality" test in at least one instance. In *Mitchell v. Pilgrim Holiness Church Corp.*, the court held that employees of a religious corporation were entitled to FLSA protection, even after several employees filed affidavits indicating that they did not consider themselves "'mere wage earners,' but rather that they had accepted work with the defendant in belief that they were doing religious work." *Mitchell*, 210 F.2d 879, 881 (1954) (citation omitted).

filed suit to recover wages.¹⁴⁵ Consequently, it seems logical that he would be entitled to the protections of the Act. Further, the Supreme Court has instructed that the FLSA be applied “liberally. . . to the furthest reaches consistent with congressional direction.”¹⁴⁶ The Court has repeatedly cautioned lower courts not to overstep their bounds in applying FLSA exceptions.¹⁴⁷ Based on the preceding findings, the majority’s decision was in direct conflict with Supreme Court precedent.

To be sure, it is arguable that a lengthy list of exemptions from the FLSA implies that Congress did not intend the FLSA’s reach to be expansive.¹⁴⁸ Yet this contention is weak because the FLSA’s legislative history indicates that Congress intended very broad coverage.¹⁴⁹ Based on the Act’s unambiguous text and its legislative history, the Supreme Court has announced that Congress intended the Act’s coverage to be expansive, indicating that the list of exemptions was intended to be exhaustive, rather than illustrative.¹⁵⁰ This line of reasoning bolsters the dissenting argument in *Shaliehsabou* that the majority erred in reading into the FLSA a ministerial exemption that lacks support in the Act’s text.

B. *The Fourth Circuit’s Reliance on Dole in Deciding Shaliehsabou*

The Fourth Circuit based its conclusion in *Shaliehsabou* on its earlier decision in *Dole*.¹⁵¹ Yet a consideration of the basis and the shortcomings of *Dole* indicates that this reliance was in error.¹⁵²

145. See *Shaliehsabou v. Hebrew Home of Greater Wash., Inc.*, 247 F. Supp. 2d 728 (D. Md. 2003), *aff’d*, 363 F.3d 299 (4th Cir. 2004).

146. *Alamo*, 471 U.S. at 296 (quoting *Mitchell v. Lublin, McGaughy & Assoc.*, 353 U.S. 207, 211 (1959)).

147. *Id.*; see also *A.H. Phillips, Inc. v. Walling*, 324 U.S. 490, 493 (1945) (declaring that exemption from FLSA coverage should extend only to those “plainly and unmistakably within its terms and spirit”).

148. *Pension Benefit Guaranty Corp. v. LTV Corp.*, 496 U.S. 633, 649 (1990) (holding list of exemptions to be illustrative where neither the text nor the legislative history indicates that the list was intended to be exhaustive). *But see City of Chicago v. Environmental Defense Fund*, 511 U.S. 328, 337-38 (1994); *Keene Corp. v. United States*, 508 U.S. 200, 208 (1993) (holding that listed exemptions demonstrate that Congress knew how to draft exemptions, and would have done so if a particular exemption were intended). The fact that Congress has created and revoked exemptions over time also indicates that Congress is prepared and willing to change the Act’s provisions when necessary. THE FAIR LABOR STANDARDS ACT, *supra* note 5, at 160-61.

149. *Alamo*, 471 U.S. at 296.

150. *Id.*

151. *Dole v. Shenandoah Baptist Church*, 899 F.2d 1389 (4th Cir. 1990).

152. This Note is not intended to imply that *Dole* was decided incorrectly, be-

First, it seems inappropriate that in recognizing a ministerial exemption from the FLSA, the *Dole* court turned to congressional debate surrounding the “enterprise” amendment of 1966.¹⁵³ The original version of the amendment would have included schools of higher learning, but not elementary or secondary schools.¹⁵⁴ Congressman Collier proposed that the amendment also include public and private elementary and secondary schools.¹⁵⁵ Although Congressman Collier expressed that he “did not intend to cover [nuns as employees],” an amendment to the term “employee” was never drafted.¹⁵⁶ The amendment’s final version did not address a ministerial exception to the term “employee” under the FLSA.¹⁵⁷ The final amendment stated solely that elementary and secondary schools, whether operated for profit or not for profit, should be considered “enterprises” for FLSA purposes.¹⁵⁸

The *Dole* majority’s reliance on the 1966 congressional exchange between Congressmen Collier and Burton was misplaced.¹⁵⁹ The majority in *Shaliehsabou* and the *Dole* court assert that this debate provides a basis and a justification for a ministerial exemption from the FLSA.¹⁶⁰ However, “the debate in which the relevant exchange occurred did not concern the term it is offered to modify[, employee,] and Congress modified the definition of the term at issue[, enterprise,] immediately following the debate . . . but not in the way suggested by the exchange.”¹⁶¹ Had Congress enacted an amendment to the term “employee” after the debate, its intent to

cause the court in *Shaliehsabou* is relying strictly on dicta in *Dole*. In dicta, the *Dole* court announced that there was a ministerial exemption from the FLSA. *Id.* at 1396. However, such an exemption would not affect the outcome of *Dole* because the employees at the church-operated schools did not meet the primary duties test, which the court applied. *Id.* at 1397.

153. *Id.* at 1394. For further explanation of the 1966 amendment and its accompanying congressional debate, see *supra* Parts I.B and II.B.2.

154. *Dole*, 899 F.2d at 1394.

155. *Id.*

156. *Id.*

157. See 29 U.S.C. § 203(r)-(s) (2000).

158. *Dole*, 899 F.2d at 1394; see also 29 U.S.C. § 203(r). The final version of the amendment changed the criteria for the “enterprise” aspect of the FLSA, but not for the “employee” aspect.

159. *Shaliehsabou v. Hebrew Home of Greater Wash., Inc.*, 369 F.3d 797, 800-01 (4th Cir. 2004) (Luttig, J., dissenting) (citing 112 CONG. REC. 11360, 11371 (1966)).

160. *Shaliehsabou v. Hebrew Home of Greater Wash., Inc.*, 363 F.3d 299, 306 (4th Cir. 2004), *reh’g en banc denied*, 369 F.3d 797 (4th Cir. 2004); *Dole*, 899 F.2d at 1396.

161. *Shaliehsabou*, 369 F.3d at 801 (Luttig, J., dissenting) (citing to the final version of the amendment, which appears in 29 U.S.C. § 203(e)(3), and Fair Labor Standards Amendments of 1966, Pub. L. 89-601, 80 Stat. 830). Because Congress did not amend the term “employee” there is no way to discern whether other members of Con-

preclude ministerial employers from enjoying protection under the FLSA would be clear, but it did not.¹⁶² Therefore, and in accordance with Judge Luttig's argument, the 1966 congressional exchange is not a meaningful foundation for the exemption.¹⁶³

Although the congressional exchange demonstrates that one or two members of the House believed that "members of a religious order" were not "employees" within the FLSA, it fails as a demonstration of congressional intent.¹⁶⁴ The Fourth Circuit and the Supreme Court have recognized that "[t]he remarks of individual legislators, even sponsors of legislation, . . . are not regarded as a *reliable* measure of congressional intent."¹⁶⁵ This maxim is particularly relevant when the meaning of the statutory text is clear.¹⁶⁶ In certain situations, congressional exchanges can aid in attributing meaning to ambiguous pieces of legislation. However, as noted previously, the plain language of the FLSA is devoid of an intention to provide an exemption for ministerial employees, and therefore the remarks relied on by the *Dole* court are not a reliable measure of congressional intent. Despite the contrary context and lack of authority of the 1966 congressional exchange, both the Fourth Circuit and the DOL relied on it to carve out a ministerial exception to the FLSA.

The *Dole* court concluded that a ministerial exemption from the FLSA was appropriate, relying on the congressional exchange, but held that the plaintiffs did not fall within this narrow exception, based on the "primary duties" test announced in *Rayburn*.¹⁶⁷ The "primary duties" test established for Title VII claims, however, is

gress supported Congressman Collier's interpretation of the term "employee." *Id.* at 801 n.2.

162. Note that congressional intent is arguably *very* clear because Congress discussed the term employee and had the opportunity to amend and clarify the statute. However, it *chose* not to.

163. *Shaliehsabou*, 369 F.3d at 800-02.

164. *Id.* at 800.

165. *Id.* at 801 (citing *W. Va. Univ. Hosp., Inc. v. Casey*, 499 U.S. 83, 98-99 (1991); *Weinberger v. Rossi*, 456 U.S. 25, 35 (1982); *Roy v. County of Lexington*, 141 F.3d 533, 539 (4th Cir. 1998)) (alteration in original).

166. *Id.* at 801 (citing *Bath Iron Works Corp. v. Director*, 506 U.S. 153, 166 (1993); *Regan v. Wald*, 468 U.S. 222, 237 (1984); *Pa. R.R. Co. v. Int'l Coal Mining Co.*, 230 U.S. 184, 199 (1913)).

167. *Dole*, 899 F.2d at 1396-97. The *Rayburn* court held that a ministerial exemption from Title VII depended on the "spiritual and pastoral" function of the position and not the characterization of the position as clergy. *Rayburn v. Gen. Conference of Seventh-day Adventists*, 772 F.2d 1164, 1168-69 (4th Cir. 1985). Note that this case was discussing an exemption from Title VII and not an exemption from the FLSA.

not pertinent to claims of employees under the FLSA.¹⁶⁸ Moreover, the *Dole* court did not clearly justify its decision to extend the Title VII “employee” criteria to the proposed FLSA “employee” exemption.¹⁶⁹ Judge Luttig points out in his dissenting opinion, “The fact that an individual is a ‘ministerial’ employee or that his primary duties are religious in nature has no bearing on [the] determination [of whether that person is to be considered an employee under the FLSA].”¹⁷⁰

The 1966 congressional dialogue misled not only the *Dole* court, but also the DOL.¹⁷¹ In fact, in recognizing a ministerial exemption from the FLSA, the *Dole* court relied considerably on DOL guidelines, which sought to decipher the 1966 legislative discussion.¹⁷² In spite of the inherent flaws in the aforementioned congressional exchange, the Wage and Hour Division of the DOL relied on this dialogue to add a provision to its Field Operations Handbook (“FOH”).¹⁷³ The provision states that “[p]ersons such as nuns, monks, priests, lay brothers, ministers, deacons, and other members of religious orders who serve pursuant to their religious obligations in the schools, hospitals, and other institutions operated by their church or religious order shall not be considered to be ‘employees.’”¹⁷⁴ Though the DOL decided to list this provision in its handbook, the FOH by no means compels a court to apply its contents.¹⁷⁵ Generally, when an administrative agency is empowered

168. See *Shaliehsabou*, 369 F.3d at 800 (Luttig, J., dissenting).

169. Further, when the *Shaliehsabou* court extended the Title VII employee criteria to its proposed FLSA ministerial exemption, its sole justification was that this particular court had drawn the same analogy in past cases. *Shaliehsabou v. Hebrew Home of Greater Wash., Inc.*, 363 F.3d 299, 306-07 (4th Cir. 2004), *reh’g en banc denied*, 369 F.3d 797 (4th Cir. 2004) (citing *Dole* and *EEOC*). The *Shaliehsabou* majority did say that courts are familiar and comfortable with this test. *Id.* at 307. But is that really a valid reason for choosing to apply a particular test?

170. *Id.* at 799. Here Judge Luttig is referring to the primary duties test utilized in *Rayburn*, a Title VII case. See *supra* Part II.A.

171. Congress gave the U.S. DOL the power to enforce and interpret the FLSA. THE FAIR LABOR STANDARDS ACT *supra* note 5, at 40.

172. *Dole*, 899 F.2d at 1396.

173. The Field Operations Handbook is a guide for Wage and Hour investigators, and is also available to the public. THE FAIR LABOR STANDARDS ACT, *supra* note 5, at 40-41.

174. *Shaliehsabou v. Hebrew Home of Greater Wash., Inc.*, 369 F.3d 797, 801 (4th Cir. 2004) (citing WAGE AND HOUR DIVISION, U.S. DEPT. OF LABOR, *infra* note 178, at § 10b03).

175. See THE FAIR LABOR STANDARDS ACT, *supra* note 5, at 164-66; see, e.g., *Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944) (holding that administrative rulings, interpretations, and opinions may provide guidance but are not controlling); *Overnight Motor Transp. Co. v. Missel*, 316 U.S. 572, 580 n.17 (1942) (interpretive bulletins from

to craft legislation, resulting regulations are given the force of law.¹⁷⁶ However, where the agency is only given the power to interpret regulations, the findings are not binding.¹⁷⁷ In its foreword, the FOH states that it is “not used as a device for establishing interpretive policy.”¹⁷⁸ Indeed, in *Skidmore v. Swift & Co.*,¹⁷⁹ the Supreme Court listed factors to consider when assessing the degree of deference to be afforded to an interpretive regulation issued by an administrative body assigned the task of interpreting a law.¹⁸⁰ The Court offered the following:

We consider that the rulings, interpretations and opinions of the Administrator under the Act, while not controlling upon the courts by reason of their authority, do constitute a body of experience and informed judgment to which courts and litigants may properly resort for guidance. The weight of such a judgment in a particular case will depend upon the thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade, if lacking power to control.¹⁸¹

In adopting a religious exception to the FLSA based solely on a congressional exchange between a few members of Congress, the DOL failed to thoroughly consider the issue before it. Consequently, the DOL guideline should be afforded limited deference.¹⁸² The DOL provides no reasoning or rationale in the FOH for the exclusion of ministerial employees, and therefore, this regulation has “no persuasive power beyond the exchange on the House

administrative agencies do carry persuasiveness but are not binding authority); *Sherwood v. Washington Post*, 871 F.Supp. 1471, 1481 (D.D.C. 1994) (holding that interpretations of administrative agencies are not legislative regulations and do not have force of law); *Dalheim v. KDFW-TV*, 918 F.2d 1220, 1228 (5th Cir. 1990) (administrative interpretations are not binding as law and are merely “a body of experience and informed judgment to which courts and litigants may properly resort for guidance” (quoting *Skidmore*, 323 U.S. at 140)).

176. THE FAIR LABOR STANDARDS ACT, *supra* note 5, at 164-66.

177. *Id.*

178. WAGE AND HOUR DIVISION, U.S. DEPT. OF LABOR, FIELD OPERATIONS HANDBOOK 1 (1993). The guidelines in the FOH are not intended to be official rules and regulations, but are merely intended to provide guidance for employees. The DOL’s official regulations, which it is empowered to enact into law, provide no similar exemption for “ministerial employees.” *Shaliehsabou*, 369 F.3d at 802 n.5.

179. 323 U.S. 134 (1944).

180. THE FAIR LABOR STANDARDS ACT, *supra* note 5, at 165-66 (citing *Skidmore*, 323 U.S. at 140).

181. *Skidmore*, 323 U.S. at 140.

182. *Shaliehsabou*, 369 F.3d at 800-02 (Luttig, J., dissenting).

floor on which it was based.”¹⁸³ The Fourth Circuit erred in deferring to the DOL guidelines without considering either the reasoning behind such guidelines or the appropriate weight to be afforded to them. In turn, both the *Dole* and *Shaliehsabou* opinions relied on refutable DOL guidelines to carve out a ministerial exception to the FLSA.

To further complicate the court’s already problematic reliance on DOL guidelines, the *Shaliehsabou* court applied the FLSA ministerial exception based on its decision in *Dole*, and held that *Shaliehsabou* was not entitled to overtime pay in light of his primary duties as a Mashgiach.¹⁸⁴ The *Shaliehsabou* decision is a product of the majority’s reliance on *Dole*, which improperly relied on DOL guidelines. As demonstrated previously, the DOL guidelines were a product of improper reliance on congressional debate. The *Shaliehsabou* decision is the most recent link in a chain of faulty reasoning.

C. *Scope of the Ministerial Exemption*

The *Dole* and *Shaliehsabou* majorities not only accepted a ministerial exemption from the FLSA but also expanded it far beyond any reasonably intended reach.¹⁸⁵ As Judge Luttig concedes, even though the exemption adopted by the DOL lacks credibility, it is at least a narrow exception, as required by the Supreme Court.¹⁸⁶ Though in 1966 Congressman Collier broadly stated “that ‘members of a religious order’ were not ‘employees’ within the meaning of the [FLSA],” the FOH adopted a more narrow construction of the rule.¹⁸⁷ The FOH “provided that, ‘[1] members of religious orders who [2] serve pursuant to their religious obligations [3] in the schools, hospitals, and other institutions operated by their church or religious order shall not be considered to be ‘employees.’”¹⁸⁸ De-

183. *Id.* at 802; *see also* *INS v. Cardoza-Fonseca*, 480 U.S. 421, 452-53 (1987) (Scalia, J., concurring) (explaining that legislative history must reach a high level of certainty to support an agency interpretation that departs from a facially clear statute).

184. *Shaliehsabou v. Hebrew Home of Greater Wash., Inc.*, 363 F.3d 299, 311 (4th Cir. 2004), *reh’g en banc denied*, 369 F.3d 797 (4th Cir. 2004).

185. *Id.* at 798, 802 (Luttig, J., dissenting).

186. *Id.* at 802. Exemptions from the FLSA are to be narrowly construed because Congress put considerable time and effort into carefully considering and enumerating exemptions. *See generally* THE FAIR LABOR STANDARDS ACT, *supra* note 5, at 163-64. *See also* *A.H. Phillips, Inc. v. Walling*, 324 U.S. 490, 493 (1945); *Addison v. Holly Hill Fruit Products*, 322 U.S. 607, 618 (1944).

187. *Shaliehsabou*, 369 F.3d at 800, 802 (Luttig, J., dissenting).

188. *Id.* at 802-03 (citing WAGE AND HOUR DIVISION, *supra* note 178, at § 10b03).

spite the Supreme Court's mandate necessitating narrow exemptions to the FLSA,¹⁸⁹ the majority in *Shaliehsabou* went beyond the standards set forth by both Congressman Collier and the DOL guidelines and "adopt[ed] wholesale the contours of the *constitutionally-required* exception of 'ministerial' employees from the coverage of Title VII and other civil rights laws."¹⁹⁰

The excessively broad test that *Shaliehsabou* adopted for determining whether a person is exempt under the proposed ministerial exemption to the FLSA is as follows: An employee is exempt from the FLSA's coverage "so long as (1) [the] employee's 'primary duties consist of teaching, spreading the faith, church governance, supervision of a religious order, or supervision or participation in religious ritual and worship,' and (2) that employee is employed by a 'religiously-affiliated' institution 'marked by clear or obvious religious characteristics.'"¹⁹¹ Applying this standard in Title VII cases, courts have excluded secular workers in religious institutions from Title VII protection.¹⁹² However, none of these employees would have been excluded had the applicable test been similar to that described in the FOH, which focuses on an employee's "religious obligations," and not his or her "primary duties."¹⁹³ More importantly, *Shaliehsabou*, an employee responsible for supervising food preparation in compliance with Jewish dietary laws in a nursing home, may not have met the DOL's more rigid standard for an exemption.¹⁹⁴ Had the court applied the DOL standard set forth in the FOH, rather than the Title VII standard, *Shaliehsabou* may have been afforded FLSA coverage. Thus, the broad scope of the constitutionally-compelled Title VII exemption "cannot be reconciled with" the narrow exemption alluded to in the 1966 congress-

189. See generally THE FAIR LABOR STANDARDS ACT, *supra* note 5, at 163-64. See also *A.H. Phillips*, 324 U.S. at 493; *Addison*, 322 U.S. at 618.

190. *Shaliehsabou*, 369 F.3d at 802 (Luttig, J., dissenting) (emphasis in original).

191. *Id.* at 803 (citations omitted).

192. See, e.g., *Alicea-Hernandez v. Catholic Bishop of Chicago*, 320 F.3d 698, 704 (7th Cir. 2003) (applying exemption to church press secretaries); *EEOC v. Southwestern Baptist Theological Seminary*, 651 F.2d 277, 283 (5th Cir. 1981) (applying exemption to faculty at seminaries). However, *Tony and Susan Alamo Foundation v. Secretary of Labor* makes clear that the government is free to involve itself in secular activities of religious organizations for FLSA purposes. 471 U.S. 290, 305-06 (1985).

193. *Shaliehsabou*, 369 F.3d at 803 (Luttig, J., dissenting).

194. *Id.* Judge Luttig explained that *Shaliehsabou* would not meet the DOL standard of (1) "'a member of a religious order'" who was (2) "'serv[ing] pursuant to [a] religious obligation.'" *Id.* (citing WAGE AND HOUR DIVISION, *supra* note 178, at § 10b03).

sional hearing and described in the FOH.¹⁹⁵

The *Shaliehsabou* majority failed to justify its extension of the Title VII standard to FLSA disputes. Judge Luttig points out,

[T]he majority not only accepts [an exemption for ministers] from the FLSA without so much as questioning the soundness of its foundation, but expands the contours of the exemption far beyond that which even the exemption's shaky foundation can support. In so doing, the majority rejects the only conceivable basis for a ministerial exemption in sources related to the Act itself, and, instead, adopts [the requirements] of the *constitutionally-required* [Title VII exemption].¹⁹⁶

The majority adopted the Title VII standard for exceptions to the FLSA as a “‘common sense approach’” because the two are “‘coterminous in scope.’”¹⁹⁷ However, there exists a discrepancy between the origin of a Title VII exemption, which is rooted in constitutional principles, and the proposed FLSA exemption, which is based on congressional debate and the DOL guidelines.¹⁹⁸ An exemption from Title VII for a religious organization's decisions in hiring ministerial employees is necessitated by the First Amendment's Religion Clauses. If Congress interfered with hiring decisions with respect to employees who perform religious functions, it would be interfering with the free exercise of religion.¹⁹⁹ However, constitutional problems do not arise when the FLSA is applied to religious organizations. Compelling religious organizations to comply with fair labor standards by paying a minimum wage and overtime pay affects the organization's economic position, not its religious goals. In fact, imposing fair labor standards in no way interferes with hiring decisions.

Another flawed reason that the majority offered in favor of the

195. *Id.* at 804; see *EEOC v. Roman Catholic Diocese of Raleigh*, 213 F.3d 795, 801 (4th Cir. 2000) (“[T]he ministerial exception to Title VII is robust where it applies.”).

196. *Shaliehsabou*, 369 F.3d at 802 (Luttig, J., dissenting) (emphasis in original). Judge Luttig seems to be saying that the majority has no justification for carving out an exemption to the FLSA, especially because the majority is inventing an exception nearly identical in scope to the “constitutionally-required” exemption under Title VII.

197. *Id.* at 803 (referring to majority's statement in *Shaliehsabou v. Hebrew Home of Greater Wash., Inc.*, 363 F.3d 299, 306 (4th Cir. 2004) (“coextensive in scope” and “common sense approach”)).

198. *Id.* at 803-04. A Title VII exemption is based on the necessity for autonomy in religious organizations' hiring decisions. However, compelling a religious organization to pay a minimum wage or overtime pay does not hinder religious autonomy in the same way that state interference with hiring decisions would.

199. See *infra* Part III.D for further explanation of these constitutional principles.

Title VII “primary duties” test was that the court had already implied the applicability of the primary duties test in *Dole*.²⁰⁰ The previous section demonstrates, however, that the reasoning applied by the *Dole* court in announcing a ministerial exemption to the FLSA was faulty. Moreover, in *Dole*, the Title VII cases referred to by the employer were merely distinguished and found irrelevant by the court.²⁰¹

As support for its holding, the majority also relied upon the listing of *Dole* in a string citation in the *EEOC*²⁰² case as support for the proposition that “[t]he ministerial exception operates to exempt from the coverage of various employment laws the employment relationships between religious institutions and their ‘ministers.’”²⁰³ It is, however, irrelevant that *Dole* was listed in a string citation in *EEOC* to support this proposition.²⁰⁴ *EEOC* was a Title VII case in which FLSA issues were not before the court.²⁰⁵ The court cannot reasonably lend meaning to the *Dole* case based on dicta from a Title VII case, without stretching the meaning of the Title VII case beyond recognition.²⁰⁶

D. *No Collision between the FLSA and the First Amendment*

1. Establishment Clause

An additional blemish on the *Shaliehsabou* majority’s ruling is that it found the FLSA exemption to be commensurate with the Title VII exemption “in order to ‘avoid answering a difficult constitutional question [such as] whether the First Amendment would otherwise compel an exception to the FLSA coextensive with that recognized as constitutionally mandated in the Title VII context.’”²⁰⁷ As a general matter, it seems unreasonable for judges to issue particular rulings merely to avoid answering difficult questions. Furthermore, Judge Luttig posited that in *Shaliehsabou* con-

200. *Shaliehsabou v. Hebrew Home of Greater Wash., Inc.*, 363 F.3d 299, 306 (4th Cir. 2004), *reh’g en banc denied*, 369 F.3d 797 (4th Cir. 2004).

201. *Id.* See generally *Dole v. Shenandoah Baptist Church*, 899 F.2d 1389 (4th Cir. 1990).

202. *EEOC v. Roman Catholic Diocese of Raleigh*, 213 F.3d 795, 800 (4th Cir. 2000).

203. *Shaliehsabou*, 363 F.3d at 306 (quoting *EEOC v. Roman Catholic Diocese of Raleigh*, 213 F.3d 795, 800 (4th Cir. 2000)).

204. *Shaliehsabou*, 369 F.3d at 804 (Luttig, J., dissenting)

205. *Id.*

206. *Id.*

207. *Shaliehsabou*, 363 F.3d at 306. See *supra* Part I.C for a discussion of policy reasons behind Title VII ministerial exemptions.

stitutional concerns were not at issue.²⁰⁸ Requiring Hebrew Home to pay Shaliehsabou for overtime hours “does not require the government—or the court—to question the Hebrew Home’s religious beliefs, inquire into the religious nature of the activities that Shaliehsabou performs, or to become involved in any way in the governance or functioning of the institution.”²⁰⁹

Indeed, the Supreme Court in *Alamo* held that the minimum wage, overtime, and record-keeping provisions of the FLSA could be applied to religious organizations engaged in “‘commercial activities undertaken with a business purpose.’”²¹⁰ The Court noted that

[allowing the Foundation to pay employees] substandard wages would undoubtedly give petitioners and similar organizations an advantage over their competitors. It is exactly this kind of “unfair method of competition” that the [FLSA] was intended to prevent . . . and the admixture of religious motivation does not alter a business’s effect on commerce.²¹¹

Moreover, by providing this economic advantage to religious organizations, the government arguably would be favoring religion over secularism, thereby violating the Establishment Clause.²¹² The Court further explained that this level of government intervention would not pose a risk of improper government interference with

208. *Shaliehsabou*, 369 F.3d at 805 (Luttig, J., dissenting) (noting, as evidence of this proposition, that Hebrew Home did not even suggest constitutional concerns in its briefs).

209. *Id.* (citing *Jimmy Swaggart Ministries v. Board of Equalization*, 493 U.S. 378, 395-97 (1990)). *Jimmy Swaggart Ministries* held that the government violates the First Amendment when it interferes with the church’s right to religious autonomy. 493 U.S. at 395-97.

210. *Shaliehsabou*, 369 F.3d at 805 (Luttig, J., dissenting) (quoting *Tony and Susan Alamo Found. v. Sec’y of Labor*, 471 U.S. 290, 305 (1985)). In *Alamo*, the Act was held applicable to a non-profit religious organization. The organization’s primary purposes were to “establish, conduct and maintain an Evangelistic Church; to conduct religious services, to minister to the sick and needy, to care for the fatherless and to rescue the fallen, and generally to do those things needful for the promotion of Christian faith, virtue and charity.” *Alamo*, 471 U.S. at 292. For a further explanation of *Alamo*, see *supra* Part II.B.2.

211. David L. Gregory, *Government Regulation of Religion Through Labor and Employment Discrimination Laws*, 22 STETSON L. REV. 27, 51-52 (1992) (quoting *Alamo*, 471 U.S. at 299) (alterations in original). In *Alamo*, the Supreme Court stated that “[r]eligious organizations do not have carte blanche to exploit persons employed in their commercial ventures.” David L. Gregory, *The First Amendment Religion Clauses and Labor and Employment Law in the Supreme Court, 1984 Term*, 31 N.Y.L. SCH. L. REV. 1, 24 (1986).

212. *Alamo*, 471 U.S. at 305-06.

religious autonomy.²¹³ Had the *Shaliehsabou* court compelled Hebrew Home to provide overtime pay to the plaintiff, a worker who supervised food preparation in accordance with Jewish kosher laws, the finding would be easily reconcilable with the Supreme Court's decision in *Alamo*.²¹⁴ Like the Alamo Foundation, Hebrew Home of Greater Washington is a non-profit religious organization that has entered the "economic arena."²¹⁵ A strong comparison can be made between Shaliehsabou, a supervisor in a religiously-based nursing home's kitchen, and the workers who were spreading the Christian faith for the Alamo Foundation. Thus, relieving Hebrew Home of its duty to pay Shaliehsabou, an employee who worked in exchange for compensation, would violate the Establishment Clause by favoring religious organizations engaged in commerce over similar secular organizations.

2. Free Exercise Clause

There exists a major distinction between imposing fair labor standards upon a religious organization and interfering with that organization's hiring choices. "Any [effort by the state] to restrict a church's free choice [in employing] its leaders . . . constitutes a burden on the church's free exercise rights."²¹⁶ If such an attempt is made by the government, the court must resolve the free exercise question by applying a balancing test. The test involves "a balancing of the burden on free exercise against the 'impediment to . . . [the state's] objectives that would flow from recognizing the claimed . . . exemption.'"²¹⁷ As previously explained, the *Rayburn* court applied the "primary duties" test²¹⁸ to assess whether the functions of the position embody the basic purpose of the religious institution. If they do, then state scrutiny of the hiring process would raise constitutional concerns, as the state "must not foster 'an excessive government entanglement with religion.'"²¹⁹

213. *Shaliehsabou*, 369 F.3d at 805 (citing *Alamo*, 471 U.S. at 305).

214. It seems highly unlikely that compelling Hebrew Home to provide Shaliehsabou with overtime pay would affect the religious autonomy of the nursing home.

215. It seems that Hebrew Home meets the "economic reality" test applied in *Alamo*, 471 U.S. at 294-95.

216. *Rayburn v. Gen. Conference of Seventh-day Adventists*, 772 F.2d 1164, 1168 (4th Cir. 1985).

217. *Id.* (quoting *Wisconsin v. Yoder*, 406 U.S. 205, 221 (1972)) (alterations in original).

218. See *supra* note 78 and accompanying text.

219. *Lemon v. Kurtzman*, 403 U.S. 602, 613 (1971) (quoting *Walz v. Tax Comm'n*, 397 U.S. 664, 674 (1970)). In *Lemon*, the Supreme Court proposed the following test for determining the validity of a statute under the Establishment Clause: "First, the

However, the FLSA is not concerned with hiring, and compelling a religious organization to act in accordance with the FLSA does not implicate the First Amendment. Though it is arguable that Shaliehsabou's primary duties are ministerial, such a finding is of no consequence. The primary duties test is to be applied to employees seeking relief under Title VII and not to employees, like Shaliehsabou, staking a claim under FLSA. Application of fair labor standards to religious organizations does not compromise religious freedom in the same manner as would state interference with a religious organization's hiring. If application of fair labor standards did in fact compromise religious freedom, religious organizations would be entirely exempt from FLSA scrutiny, perhaps even with respect to non-ministerial employees. This result would be in direct conflict with the Supreme Court's holding in *Alamo*.²²⁰

While applying fair labor standards to religious organizations does impose minimal interference with an organization's labor practices, the application does not violate the First Amendment because the First Amendment does not operate without limitation.²²¹ Although individuals have the right "to believe in any religious doctrine," the "power to act pursuant to that belief" is limited.²²² The Supreme Court has explained that the free exercise guarantee is "not violated by reasonable, nondiscriminatory regulation by" the government to "preserve[] peace, order and tranquility."²²³ In *Mitchell v. Pilgrim Holiness Church Corp.*, the Seventh Circuit held "that the [FLSA] is . . . a reasonable, nondiscriminatory regulation" promulgated by Congress that applied to Pilgrim Holiness Church Corporation ("Pilgrim Church"), an organization that prints and

statute must have a secular legislative purpose; second, its principal or primary effect must be one that neither advances nor inhibits religion; finally, the statute must not foster 'an excessive government entanglement with religion.'" *Id.* at 612-13 (quoting *Walz*, 397 U.S. at 674) (citation omitted). The application of Title VII to decisions regarding employment of ministerial figures violates the third factor of the *Lemon* test. *Rayburn*, 772 F.2d at 1170.

220. *Tony and Susan Alamo Found. v. Sec'y of Labor*, 471 U.S. 290 (1985).

221. *Mitchell v. Pilgrim Holiness Church Corp.*, 210 F.2d 879, 884 (7th Cir. 1954).

222. *Id.* at 884. The court cites *Gara v. United States*, 178 F.2d 38, 40 (5th Cir. 1949) to explain that "[t]he guaranty of freedom of religion . . . is not a guaranty of immunity for violation of law." *Id.* In *Gara*, "[t]he defendant . . . was found guilty of violating the Selective Service Act, although he believed that it was his Christian duty to" do so. *Id.*; see also *Reynolds v. United States*, 98 U.S. 145 (1878) (affirming a conviction for bigamy even though the defendant insisted it was his religious duty to marry his second wife).

223. *Mitchell*, 210 F.2d at 885 (citing *Poulos v. New Hampshire*, 345 U.S. 395 (1953)).

disseminates religious material.²²⁴ The court noted that the FLSA was intended to protect “the welfare of all workers, and that [applying] the provisions of the Act to” religious corporations would not violate the First Amendment.²²⁵ Arguably, the fact that Shaliehsabou filed suit to assert his rights under the FLSA makes his case more compelling than that of Pilgrim Church’s workers. Both Shaliehsabou and the Pilgrim Church employees were spreading religious faith. Yet, Pilgrim Church “filed affidavits made by several of its employees indicating that they . . . had accepted [their positions] in the belief that they were doing religious work,” thereby accepting the inapplicability of the FLSA.²²⁶ In contrast, Shaliehsabou expected the protection of fair labor standards despite his ministerial role, and asserted his right by filing suit. Strong factual comparisons can be drawn between *Mitchell* and *Shaliehsabou*, and it seems that if the Fourth Circuit had considered the persuasive reasoning of the Seventh Circuit, it likely would have held that Shaliehsabou, a kitchen supervisor in a nursing home with a predominantly Jewish population, was a protected employee under the FLSA.

CONCLUSION

The Fourth Circuit’s decision to recognize a ministerial exception to the FLSA permits religious organizations to exploit workers who were intended to be protected against unfair labor practices. Under this decision, religious organizations have been vested with an unfair economic advantage, in that they will be able to hire cheap labor. This is precisely the problem that the FLSA was designed to prevent.

Although the government walks a fine line when it interferes with religion, fair labor standards impose a minimal burden, if any, on free exercise of religion. Fair labor standards merely impose economic rules; they do not affect a religious organization’s inherently private hiring criteria. Although the First Amendment’s Religion Clauses embody constitutional rights, fair labor standards serve equally compelling interests. The critical role of fair labor standards is especially evident when considered in light of our commercial, economically-driven society and the value placed upon

224. *Id.*

225. *Id.*

226. *Id.* Despite the employees’ affidavits, the court still held the FLSA to be applicable to the Pilgrim Church. *Id.* at 885.

these concerns. Religious organizations that have entered the economic arena should not be shielded so that they may take advantage of workers and receive unfair advantages in a competitive market. Imposing fair labor standards hardly jeopardizes the constitutionally protected autonomy of a religious organization. As Congress has instructed, the judiciary must protect workers who are at risk of exploitation by applying the FLSA broadly to protect those who are clearly within its scope.

*Sarah L. Santos**

* Thank you to Tracy Magdalenski for her support and encouragement during the writing process.